No. 13096

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., Inc.,
a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corporation, and HOME INSURANCE COMPANY, a corporation,

Appellees.

Appellee's Home Insurance Company Reply Brief

THEODORE G. McKESSON
ROBERT H. RENAUD
703 Luhrs Tower
Phoenix, Arizona
Attorneys for Appellee,
HOME INSURANCE COMPANY

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STATEMENT OF THE CASE

The original complaint in this action was filed January 12, 1948, the Amended Complaint September, 1950 and the Second Amended Complaint filed at the time of trial at the request of the appellant with the Court's permission.

The only complaint before the Court is the Second Amended Complaint (T.R. 34).

The appellee's Home Insurance Company, Motion to Dismiss, plea in bar and answer of cross defendant to cross claim to appellant's two causes of action of the

Second Amended Complaint, is the one in which we are concerned in this appeal (T.R. 43).

This action originally and at all times, has been an action on a contract and not in tort. Originally judgment was sought against Eloy Gin Corporation and Home Insurance Company. After the amended complaint was filed, issues were changed and counsel for the Home Insurance Company advised the Eloy Gin Corporation of the diversity of interests. Separate pleadings were filed and the Eloy Gin Corporation sought and employed separate counsel that represented the Eloy Gin Corporation at the trial.

After the appellant had introduced the stipulation of facts and the Exhibits thereto attached (T.R. 69) the Home Insurance Company, appellee was entitled to Judgment in its favor on the first amended complaint and the cross complaint of Eloy Gin Corporation.

However, the appellant sought to inject into the issues, extraneous matter pertaining to custom of the trade on insurance premiums and then asked leave of Court to file a Second Amended Complaint to conform to the evidence which was granted and the second amended complaint was filed and thereupon the Appellee, Home Insurance Company filed its motion to dismiss, pleas in bar and answer to the second amended complaint.

The issues are simple. The Eloy Gin Corporation was engaged in several lines of business during the times mentioned in said complaints, as follows:

A. Planting, growing and harvesting of cotton.

B. Financing farmers to secure business for the gin.

C. Buying and selling cotton for its own account.
D. Ginning cotton and issuing bale receipts.

During the times mentioned, while it was so engaged in these various enterprises, the appellant's predecessor, bought 1300 bales of cotton from the Eloy Gin Corporation upon the terms and conditions set forth in plaintiff's Exhibit No. 1A, (T.R. 74).

The Court at the time of trial, did not limit his findings of fact and conclusions of law to the two items set forth in appellant's opening brief, Page 7.

The Court did not find that it was illegal to recover on loan receipts but on the contrary held that in this case the appellant, Eugene B. Smith Company had a policy of fire insurance on its cotton with the National Fire Insurance Company and was not entitled to recover for and in behalf of itself or the National Fire Insurance Company for the reason that the appellant Eugene B. Smith and Company, on the contract above referred to had relieved Eloy Gin Corporation from liability in event of fire on cotton which Eugene B. Smith had paid for prior to fire. (Findings 3, 4, 5, 6, 7, T.R. 50-51).

SPECIFICATIONS OF ERROR

(Assigned by Appellant)

POINT I

The Court below was in error in finding that Smith suffered no loss as he was reimbursed in that payment under the loan receipt reimbursed and indemnified him.

POINT II

The Court below was in error in holding that by his contracts of purchase with Eloy covering the cotton here involved, he had relieved Eloy from liability for cotton paid for in the event of fire.

POINT III

The evidence being uncontradicted, the Court below was in error in not finding that by the delivery of warehouse receipts covering the cotton in question, Eloy became a warehouseman as to Smith and by the terms of the warehouse receipts was obligated to insure the cotton and was therefore liable to appellant either because the insurance which Eloy obtained did not cover the cotton, or if it did cover the cotton, then because of its failure to make the necessary steps to collect the insurance.

POINT IV

The Court below was in error in refusing to admit testimony as to the custom of the trade with respect to billing for insurance charges after the first twenty (20) days.

ARGUMENT

POINT I

The Court did not find that Smith suffered no loss as he was reimbursed in that payment on the loan receipt as the Court's finding of fact No. 4 (T.R. 51) is as follows:

"Eugene B. Smith & Co., Inc., suffered no loss by reason of the destruction of said 39 bales of cotton

by fire, as it was reimbursed and indemnified by loan receipts for said loss by its insurance carrier, National Fire Insurance Company, and had by its *written agreement relieved Eloy Gin Corporation from any liability for any cotton on Eloy Gin Corporation's gin yard that had been paid for in the event of fire.*

In other words, the Court in effect held that by virtue of a special agreement that the appellant Smith had with Eloy, he had relieved Eloy from any responsibility to the appellant for cotton that it had bought and paid for prior to a fire, in accordance with Exhibit No. 1A (T.R. 74)

Therefore, the citations cited by the appellant under this point, although good law, are not applicable as the appellant or the National Fire Insurance Company cannot recover for something that the appellant had relieved Eloy from insuring the cotton against loss by fire where the cotton had been paid for prior to fire.

The Court in Findings of Fact No. 5 (T.R. 51) recognizes the legality of the loan receipt and the right to recover on tort and contract actions in the name of the appellant or National Fire Insurance Company but not where the appellant has made contracts contrary thereto.

We submit therefore, that appellant is clearly in error in attempting to seek any reversal based upon any decisions cited by it in the opening brief.

POINT II

The Court below was not in error in holding that the appellant Smith had by his contracts of purchase, assumed liability for the destruction of cotton by fire

after payment therefor. The purchase contracts (T.R. 74) provide for "insurance at seller's risk until payment completed."

We do not follow the appellant's argument in stating that the Court's findings of fact and conclusions of law were correct except that there was another deal or contract entered into subsequent to the original contracts referred to (T.R. 74).

The citations and the laws of Arizona employed by appellant in the opening brief, Page 12-13, under Point II, are clearly not in point and not applicable to this situation.

We refer the Court briefly to the deposition of T. S. McCorkle, one of Smith's officers, a portion of which is as follows:

"Q. Well, I call your attention to the fact that there is nothing on the face, the front page of that exhibit, which conflicts with the rules on the back, is there?

A. I don't know of anything, no, sir.

Q. I call your attention to, insurance at seller's risk until payment completed, that is proper, isn't it?

A. Let's see, "at seller's risk until payment completed." that is what it says.

Q. And that is proper?

A. That is the custom, yes, sir.

Q. When the payment is completed, then it is no longer at seller's risk?

A. That is correct. (T.R. 177)

and again in the deposition of Mr. McCorkle,

"Q. You never insure any of your cotton, you say, until you have paid for it?

A. That is the normal procedure. Actually, that is when we report it. I don't know the insurance companies' viewpoint on that, as to when we are insured, and when we are not insured, but, from a practical standpoint, a cotton man considers his cotton insured when he has paid for it.

Q. So, if you had paid for this particular cotton, it would have been insured as your cotton by the insurance, company, either the Royal or the National?

A. Yes, sir, as we paid for it, that is correct.

Q. And, if you had already made payment a month before, then it would have been your cotton, and insured under the fire insurance contract with either the Royal or the National?

A. When we pay for it, we automatically cover it with insurance, yes, sir. We don't know of the existence of the particular cotton, because we only see the receipts, or paper representing a bale of cotton." (T.R. 186).

POINT III

Appellant's third point is chiefly pointed at the liability of Eloy Gin Corporation. We wish to point out that the plaintiff's second amended complaint covers two causes of action, the first against the Eloy Gin Corporation only; the second cause of action against both the Eloy Gin Corporation and the defendant Home Insurance Company in the alternative, attempting to show a waiver of failure of Eloy Gin Corporation to make proof of loss and bring suit within one year as provided in said policy of insurance. (T.R. 79).

In fact the appellant's final contention on the second amended complaint was to seek recovery against the Eloy Gin Corporation for failure to collect and recover insurance from the Home Insurance Company within the time provided by law by reason of the fact that there were 39 bales of cotton on the Eloy Gin Corporation's yard that had not been picked up by the appellant prior to the fire, (being a part of the 1300 bales) and all paid for several months prior to the fire.

We wish to further point out that the gin yard receipt following the agreement that it had made with the appellant corporation in selling the 1300 bales, issued the gin receipts to *itself* on *itself* and then had delivered them together with grade cards to the Valley National Bank with sight draft attached, in accordance with Exhibit No. 1A (T.R. 74).

We maintain that the Eloy Gin Corporation under no circumstances could be held liable to the appellant where such contracts had been made.

The gin yard receipt further showed that some agreement other than a warehouse contract was in existence between the appellant, Smith, and the Eloy Gin Corporation, for the amount of money to be paid for storage insurance were left blank on all gin receipts and there was no insurance paid by the appellant Smith or any other person.

POINT IV

Pertaining to testimony of custom of the trade on insurance, the gin yard receipts referred to (T.R. 77) show no insurance was charged appellant Smith and the testimony of Churchill shows no such custom as

contended for in Point IV and the evidence was not admissible to prove that by virtue of the fact that some blank should have been filled in, in the gin receipt or that there was a new agreement made between Smith and Eloy contrary to the one set forth in (T.R. 74).

Appellant, in Paragraph 12 of the second amended complaint (T.R. 39) is pointed chiefly at the Eloy Gin Corporation but in the alternative judgment is sought against the Home Insurance Company by a waiver of the failure of the defendant Eloy Gin Corporation to make proof of loss or bring suit within one year as provided in said policy of insurance.

The appellant, Smith, in said second cause of action of the Second amended complaint (T.R. 39) failed to plead necessary facts that set forth a waiver as provided by the rules of the Court.

In addition thereto, appellant introduced no evidence of any waiver on the part of the Home Insurance Company or any of its agents.

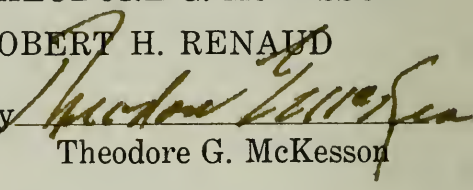
As a matter of fact, the appellant, in the opening brief, presented no law or facts why the Judgment of the Court should be reversed as to the Home Insurance Company.

As has been pointed out, appellee's, Home Insurance Company, policy did not inure to the benefit of Smith. As the second amended complaint failed to state a cause of action and no evidence was introduced or offered to prove any liability of the Home Insurance Company to the appellant, the Court properly made the findings of fact and conclusions of law as set forth (T.R. 49-53).

We therefore submit that the appellant has prosecuted a frivolous appeal and has caused the Home Insurance Company to incur attorneys fees and costs in this appeal and therefore prays that the Court affirm the decision of the Judgment of the lower Court (T.R. 54) and order the appellant to pay the appellee, Home Insurance Company, damages for a frivolous appeal in such amount as the Court may deem fit and proper under the circumstances.

Respectfully submitted,

THEODORE G. McKESSON
ROBERT H. RENAUD

By 
Theodore G. McKesson

703 Luhrs Tower
Phoenix, Arizona